

**JAN 19 2006**

**CATHY A. CATTERSON, CLERK**  
**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTHONY LEON JOHNSON,

Defendant - Appellant.

No. 04-10245

D.C. No. CR-03-05053-AWI

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Eastern District of California  
Anthony W. Ishii, District Judge, Presiding

Submitted January 9, 2006<sup>\*\*</sup>

Before: HUG, O'SCANNLAIN, and SILVERMAN, Circuit Judges.

Anthony Leon Johnson appeals the 262-month sentence imposed following his guilty-plea conviction for conspiracy, aiding and abetting, and distribution of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), (b)(1)(B), 846 and 18

---

<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

U.S.C. § 2. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Johnson contends that the district court's application of the career offender enhancement under U.S.S.G. § 4B1.1 violates the Sixth Amendment as interpreted by *Apprendi v. New Jersey* and *United States v. Booker* and therefore exceeds the statutory maximum penalty because the increase was based on facts that were not alleged in the indictment and were not found by a jury beyond a reasonable doubt or specifically admitted to by plea. This contention is foreclosed by *United States v. Von Brown*, 417 F.3d 1077, 1078-79 (9th Cir. 2005).

Because Johnson was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether any error in the imposition of the sentence under the then-mandatory Sentencing Guidelines was harmless, we remand to the sentencing court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). See *United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005).

**REMANDED.**